Petition

81-1732

No.: _____

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IN THE

Supreme Court of the United States

October Term, 1981

STEVEN GARY WEIL,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Where the Court of Appeals has found that a pre-indictment delay of almost five years, ". . . may well have prejudiced the petitioner . . . ," did it err in concluding that, despite such prejudice, an indictment may be dismissed only ". . . if the delay arises from the Government's intentional effort to improve its position"?

a.) Has the Court of Appeals misconstrued this Court's holding in *United States v. Lovasco*, 431 U.S. 783 (1977), since that Court appears to have concluded that *Lovasco* does not permit negligent pre-indictment delay as a basis for the dismissal of an indictment, and that an improper tactical objective must lie at the root of prosecutorial delay before an indictment can be dismissed upon the ground of pre-indictment delay?

b.) Where a defendant has sustained substantial prejudice due to the Government's delay in securing a perjury indictment, and where the facts underlying the claim of perjury occurred five years before the allegedly perjurious testimony and approximately ten years before the filing of the indictment, does the District Court have the power to dismiss the indictment where the delay was due to neglect and indifference?

2. Under the circumstances of this case, was it error for the District Court to deny the defendant's motion for an evidentiary hearing as to the reasons for the Government's pre-indictment delay?

3. Where a protracted pre-indictment delay has occurred, even though not tactically *motivated*, do the principles enunciated in *United States v. Lovasco, supra*, bar the Government from making improper tactical *use* of the delay at trial, by references to the defendant's failure to produce evidence, when that very evidence was rendered unavailable to the defendant by virtue of the delay?

Parties in the United States Court of Appeals

Each of the parties in the Court below are as contained in the caption of this Petition.

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IN THE

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October Term, 1981

STEVEN GARY WEIL,

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Reported Opinions Delivered in the Courts Below

No opinions have been reported in this case.

The Court of Appeals issued its Order, containing an analysis of the Petitioner's legal contentions on February 16, 1982, *United States v. Weil*, Appendix A, hereto, *infra*, at 1a-5a.* No additional opinion has been filed or reported.

*Abbreviated references in this petition are as follows:
"1a", *et seq.* - the appendices annexed to this petition.
"A.1", *et seq.* - the Appellant's Appendix in the Court of Appeals.

The District Court filed two memorandum-opinions relating to the issues raised by this petition. The first denied a pre-trial motion for a dismissal of the indictment upon the ground of pre-indictment delay, *United States v. Weil*, Appendix B, hereto, *infra*, at 6a-11a. The second denied a post-trial motion which sought a vacation of the jury verdict and a dismissal of the indictment upon the ground of pre-indictment delay, *United States v. Weil*, Appendix C, hereto, *infra*, at 20a-22a.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Second Circuit was dated and filed on February 16, 1982 (Appendix A, hereto, *infra*, at 1a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

United States Constitution, Fifth Amendment

This case involves the due process clause of the Fifth Amendment, which provides that no person, "shall be deprived of life, liberty or property, without due process of law;".

Statement of the Case

A. Basis for Federal Jurisdiction

This is a Federal criminal prosecution, commenced by the filing of an indictment, on February 5, 1981, by a grand jury in the United States District Court for the Southern District of New York.

The indictment was in five counts, each of which charged that the defendant committed perjury (18 U.S.C. § 1621) when he testified under oath before representatives of the United States Securities and Exchange Commission (hereinafter "SEC").

B. The Course of Proceedings

On March 8 and 9, 1976, Petitioner was questioned under oath at a "private conference" conducted by representatives of the SEC. The inquiry concerned whether there had been an illegal manipulation of the public offering of the common stock of Microtherapeutics, Inc., during the period from June, 1970 to June, 1972. Petitioner had been a financial advisor to Microtherapeutics (Appendix B, *infra*, pp. 6a-9a).

On February 5, 1981, four years and eleven months after his testimony, and approximately ten years after the underlying events, the indictment herein was filed, charging that Petitioner had perjured himself in denying involvement in or knowledge of various activities relating to the promotion or manipulation of the stock (*Id.*).

Prior to trial, Petitioner moved for a dismissal of the indictment upon the ground that Government's delay for four years and eleven months had substantially prejudiced his ability to interpose a defense. The District Court received Government affidavits in opposition to the motion, and denied the motion in a memorandum opinion dated June 15, 1982 (Appendix B, *infra*, p. 19a).

The trial commenced on June 25, 1981. A motion for a dismissal, on the same ground, was renewed and expanded upon (in view of the trial proof) at the conclusion of the Government's case (A. 123; 21a). The trial concluded on July 13, 1981, with a jury verdict finding the defendant guilty upon each of the five counts of the indictment.

Subsequent to the trial, but prior to sentence, the defendant moved for a vacation of the jury verdict and dismissal of the indictment, again arguing, *inter alia*, the issue of pre-indictment delay. The motion was again denied (Appendix C, *infra*, pp. 21a-22a).

On September 1, 1981, the defendant was given an effective sentence of one year imprisonment, to be

followed by three years of probation, and was fined in the cumulative amount of five thousand dollars.

A timely notice of appeal was filed. The Court of Appeals affirmed the judgment of conviction on February 16, 1982. Its unpublished memorandum order of affirmance directly addressed the issue of pre-indictment delay (Appendix A, *infra*, pp. 3a-4a).

C. The Period of Delay

All of the allegedly perjurious answers given by the defendant related to his recollection of events which occurred during the period commencing in June, 1970 and ending in June, 1972. The testimony was given by him on March 8 and March 9, 1976. Between four and six years elapsed from the time of the underlying events until he was questioned about them.

The indictment was not filed until February 5, 1981. Thus, between nine and eleven years elapsed from the time of the underlying events until the time of the filing of the indictment, and slightly less than four years and eleven months elapsed from the time of the testimony until the filing of the indictment.

D. Prejudice Resulting From the Delay

After the underlying Microtherapeutics events, but before his SEC testimony, Petitioner was seriously injured in an airplane crash. Prior to and during his SEC testimony Petitioner specifically alerted the SEC investigators to the fact that certain of his injuries resulted in an impaired memory (Appendix B, *infra*, pp. 13a-14a, 16a-17a).

In its order of affirmance, the Court of Appeals found:

> "* * * In this case [Petitioner] may well have been prejudiced during the five year delay between his SEC testimony and the indictment as a result of the death in 1980 of Dr. Ivan Popov, who treated

> Weil from 1978 to 1980 for an alleged memory disorder, the death or disability of his attorneys at the time of the SEC investigation, and his own memory loss. * * *." (Appendix A, *infra*, pp. 3a-4a)

Petitioner's defense at trial was that: 1) the testimony of certain witnesses was untruthful or inaccurate, and 2) certain inaccuracies in Petitioner's SEC testimony were attributable to his own impaired memory and the passage of time between the underlying events and the SEC testimony.* At trial, he renewed his dismissal motion, arguing that, as a result of the pre-indictment delay, the death or disability of a number of witnesses precluded him from effectively interposing these defenses.**

E. The Government's Tactical Use of the Delay

The trial prosecutor was fully aware of the unavailability of the foregoing witnesses, particularly since the defense had made their deaths a matter of record in support of the motions for dismissal. Nevertheless, in his summation, the prosecutor sought to capitalize upon their unavailability.

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*Thus the impairment of Petitioner's memory went to two issues in these proceedings. The first related to his ability to accurately respond to questions at the SEC proceeding, a fact which he called to the attention of the SEC investigators prior to and during his testimony in that proceeding. The second related to his ability to contribute to his defense at trial.

**In support of his motion, Petitioner demonstrated that, in addition to Popov, seven other important witnesses had died, including: 1) Louis Danenberg (president of Acqualana Products, Inc., an alleged conduit for the stock manipulation); 2) Michael Santangelo (president of Microtherapeutics, Inc.); 3) Peter Burgard (successor president of Microtherapeutics, Inc.); 4) Ronald Kanter (a director of Microtherapeutics, who was allegedly present on at least two occasions when critical conversations took place between Petitioner and an important Government witness); 5) Dr. Werner Gebauer (chief of research of Aqualana); 6) Arthur Fink (Petitioner's accountant); and 7) Edward Cassidy (a witness to conversations with several Government witnesses). (A. 124-129)

Petitioner further demonstrated that the two attorneys who had represented him during the SEC investigation were incapacitated and, therefore, unavailable to him. William Sherr, Esq. suffered a mental breakdown, and David Fisther suffered a massive heart attack. (A. 26)

In commenting upon Weil's memory loss, the prosecutor argued to the jury:

> ". . . Dr. Dreisen [an expert called by the defense on the memory issue], who accepted memory losses on their face despite the proof he had in front of him that Mr. Weil had never found his memory loss sufficiently troubling to seek professional help *and no doctor who had seen him*, and Mr. Weil saw doctors for everything under the sun, from his head to his feet, *had noted that problem.*" (A. 1704) (Emphasis added)

The foregoing comments clearly constituted an unfair tactical use of the death of Dr. Popov, shortly before the return of the indictment. If. Dr. Popov had been available to the defendant, such an argument would have had no force. A similar argument was made in the prosecutor's rebuttal: "None of Weil's many doctors noted any memory impairment" (A. 1787).

Then, attempting to take advantage of the virtual cemetery of deceased witnesses in this case, the prosecutor, in his rebuttal, effectively chastised the defendant for not calling them. Of course, the jury was not aware of who might be alive or dead.

> "But you heard nothing from Mr. Weil's close associates, nothing from those who worked with him at Microtherapeutics, for example, nothing from the people who dealt with him involving the coal contract, nothing from any of the people with whom he did business in a significant way during the period of 1976 about how competent he might have been or about what memories he might have had." (A. 1788)

Against that backdrop, and under circumstances where the defendant did not testify at trial, the prosecutor in rebuttal argued that the Government's contentions as to the flow of Microtherapeutics shares, *vis a vis* the defendant, were "uncontroverted." (A. 1779)

Finally, the prosecutor completed his rebuttal by hurling the following particularly inflammatory barb at this non-testifying defendant:

> "Mr. Weil has conned the investing public, he has conned Dr. Driesen, and he tried to con the SEC. *Ask yourselves, ladies and gentlemen, whether he's not also trying to con you.*" (A. 1791-2) (Emphasis added)

Motions for a mistrial, based upon the prosecutor's references to uncontroverted evidence, his request that the jury focus upon evidence not produced by the defendant, and his accusation that the defendant was trying to "con" the jury, each were denied (A. 1793-4)

F. The Reasons for the Government's Delay

The indictment was not filed until February 5, 1981. Thus, between nine and eleven years elapsed from the time of the underlying events (1970-1972) until the time of the filing of the indictment, and slightly less than four years and eleven months elapsed from the time of the testimony (March, 1976) until the filing of the indictment.

On June 9, 1981, in response to the Petitioner's motion, the prosecution filed affidavits of three Government employees, which demonstrated that, at least, extreme neglect led to the substantial pre-indictment delay in this case.

Jacob I. Levine was the Government investigator who questioned the defendant at the private hearing in which the allegedly perjurious testimony was given. (A. 72)

Levine's affidavit stated that the investigation commenced on December 22, 1975, pursuant to a formal order of private investigation issued by the SEC. During the period between December 24, 1975 and July 29, 1977, the SEC staff interviewed or took the testimony of approximately 60 witnesses, including the Petitioner (A. 72-3).

On June 20, 1977, the SEC staff recommended to the Commission the filing of an SEC civil action against the Petitioner, four other persons and two companies. At the same time, the staff recommended that the matter be referred to the Department of Justice with a recommendation that the Petitioner be criminally prosecuted for perjury (A. 73).

On August 17, 1977, the SEC filed a civil action against Petitioner and others.

On August 29, 1977, the SEC referred the matter to the Department of Justice with a recommendation that the defendant be prosecuted for perjury (A. 73-4). At that point, one year and five months had elapsed since the alleged perjury.

Edward J. Barnes is a senior trial attorney in the Fraud Section of the Criminal Division of the United States Department of Justice. Barnes' affidavit stated that, from the spring of 1972 until the fall of 1978 he was the head of the SEC unit within the fraud section and from the fall of 1978 until May, 1980 he was Chief of the Government Regulatory Branch of the SEC (A. 83).

His affidavit further stated that, following the September, 1977 perjury referral, the matter was assigned to Hugh P. Mabe, an attorney with the Securities and Exchange Unit of the Department of Justice. Barnes' admission of the casual lack of concern for the non-pursuit of this matter by the Department of Justice is best set forth in his own words:

> "Mr. Mabe evaluated the materials and discussed his conclusions with the deponent. Based upon Mr. Mabe's analysis, the priority of other assignments and resources available, it was concluded that the Securities Unit of the Criminal Division would pursue no further action at this time. The matter was not closed but rather was held in abeyance pending receipt of any additional information that might be developed by the commission as well as the availability of attorney resources." (A. 83-4)

> "No further action was taken by the Securities unit." (A. 83-4)

No affidavit was submitted by Mr. Mabe in response to Petitioner's motion to dismiss the indictment, and no further information has been provided in this case concerning the nature of his "analysis" or why that analysis contributed to the decision to shelve the referral. Similarly, no further information has been provided concerning why this case was given a lesser "priority" than other matters or concerning the bare indication that "attorney resources" of the Department of Justice were inadequate to pursue this matter.

Berton W. Wiand, a Special Counsel with the Division of Enforcement of the SEC in Washington, had been Chief of the Division of Enforcement's Branch of Criminal Reference from the early part of 1978 to July 1980. In that capacity, he had administrative responsibility with respect to the Commission's criminal referrals to the Department of Justice (A. 81).

Mr. Wiand's affidavit stated that during the summer of 1978, responsibility for the SEC's civil suit in the Microtherapeutics case, which was then pending in the Southern District of New York, and "related matters," were assigned to Wiand's branch.

Toward the end of 1979, Wiand met with Jed Rakoff, who was then chief of the Fraud Section of the U.S. Attorney's Office in the Southern District of New York. In essence, Rakoff was looking for a case to prosecute. Wiand dusted off the shelf and found this one.

Wiand describes their discussion as follows:

> "During the course of this discussion with Rakoff, he asked whether we had any cases in the office with venue in the Southern District of New York. I informed him of a number of cases, one of which was a criminal referral relating to allegedly perjury by Steven G. Weil that occurred during the investigation that led to *SEC v. Micro Therapeutics, Inc.*

"I further informed Mr. Rakoff that this case had previously been referred to the Department of Justice in Washington, D.C. and that I was presently unaware of its status but that I would inquire with respect to the matter and inform him accordingly.

"Thereafter, I and other associates of the commission made contact with the Department of Justice and determined that the criminal referral with respect to Steven G. Weil was not actively being pursued and that the Fraud Section of the Department of Justice had no objection to the U.S. Attorney's office for the Southern District of New York pursuing the case. Therefore, I met with Mr. Rakoff and caused the Commission's referral and a newly prepared report detailing the alleged perjury to be transferred to the Southern District of New York. These materials were delivered to Mr. Rakoff in February 1980." (A 81-2)

In its memorandum in opposition to the defendant's motion, the Government conceded that, for the major portion of the delay, "no specifically investigative rationale can be assigned to that delay." The Government was content in asserting that, "no deliberate harassment of defendant or quest for tactical advantage is involved" (A. 50).*

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*This argument is made within the context of an attempt to disassociate the Southern District United States Attorney's office from the two and one-half year inaction of the Department of Justice in Washington:

"* * * Third, the longest period of delay, from August 1977 to February 1980, and the only period during which active investigatory steps were not being taken, is attributable to the Department of Justice in Washington. While no specifically investigative rationale can be assigned to that delay, it is crystal clear that no deliberate harassment of defendant or quest for tactical advantage is involved * * *" (Trial Prosecutor's Memorandum of Law, dated May 26, 1981). (A. 50)

No reason has been advanced for the additional year which elapsed between the time that the Southern District of New York took charge of the case (February, 1980) and the filing of the indictment (February, 1981).

G. Disposition of Motion Without a Hearing

In support of his motion for a dismissal upon the ground of pre indictment delay, the Petitioner also moved for an evidentiary hearing (A. 36). The District Court denied a hearing (Appendix B, *infra*, p. 19a). Thus, the only evidence in this record concerning whether the Government engaged in tactically motivated delay is in the form of affidavits submitted by two of the Government attorneys who had supervisory control over the disposition of the SEC referral. Neither of the affidavits directly address that issue.

H. The Government's Awareness That a Delay Entailed a Particular Risk of Prejudice to the Petitioner

At the SEC hearing in which the Petitioner's allegedly perjurious testimony was received, the Petitioner made clear to the SEC investigators that both the passage of time and serious injuries sustained by him in an intervening plane crash had impaired his memory powers. Those assertions are contained within the very SEC transcript which was analyzed before being shelved by the Department of Justice (Appendix B, *infra*, pp. 16a-17a).

In its memorandum in response to the Petitioner's pre-trial motion to dismiss, the Government summarized this contention as follows:

> "* * * His [Petitioner's] actual charge is that the Government acted in reckless disregard of a known risk that his ability to defend would be impaired. Defendant's Memorandum at 10-11. But no facts support this allegation. Contrary to defendant's apparent contention, absolutely nothing about defendant's case made it any more likely that witnesses would die or records be lost

than it is in any other case. As for defendant's own claim of memory loss, of course, the whole point of that claim is the defendant's memory loss had already occurred by the time of the perjury charged in the indictment. * * *" (A. 51).

It is thus clear that the Government's decision to delay, for whatever reason, was accompanied by the knowledge that the defendant suffered from a memory disability.

Reasons for Granting the Writ

Introduction

This case raises important and unresolved questions concerning the circumstances under which the due process clause of the Fifth Amendment will require the dismissal of an indictment due to pre-indictment delay, and concerning the procedures which should be followed by a trial court in assessing whether those circumstances are present.

An analysis of the opinions of the various Federal Courts of Appeals shows that there are both sharp and confusing differences of opinion concerning the standards applicable to Governmental reasons for pre-indictment delays which depart from the facts of this Court's two leading opinions on the subject. We urge that certiorari be granted so that those differences will be resolved.

In *United States v. Marion*, 404 U.S. 307 (1971), this Court was confronted with a pre-accusation delay of three years. It held that the speedy trial guarantee of the Sixth Amendment would not be applied to periods of delay between the alleged commission of the crime and the commencement of the accusatorial process (404 U.S. at 320-23). *See also: Hoffa v. United States*, 385 U.S. 293, 310 (1966).

Marion, however, went on to make clear that pre-accusation delay can give rise to a due process violation,

under the Fifth and Fourteenth Amendments, which would require dismissal of the indictment, and that ". . . the statute of limitations does not fully define the appellee's rights with respect to the events occurring prior to indictment" (404 U.S. 307, at 324).

In outlining the scope of due process considerations applicable to pre-indictment delay, *Marion* did not purport to make any universal statement other than that:

> "* * * [T]he due process clause would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellee's rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." (404 U.S. 307, at 324)

The remainder of the Court's general analysis (404 U.S. 307, at 324-25) and its application of that analysis to the facts of *Marion* (*Id.*, at 325-26), left open the question of whether and under what circumstances actual prejudice, standing alone, or tactical delay, standing alone, might require the dismissal of an indictment upon due process grounds. What is clear from *Marion* is that the mere possibility of prejudice, standing alone, will not warrant such a dismissal (*Id.* at 325-26).

The issue next came before the Court in *United States v. Lovasco*, 431 U.S. 783 (1977). In *Lovasco* the defendant was indicted for possessing firearms which were stolen from the United States mails and for dealing in firearms without a license. The indictment was filed some eighteen months after the alleged crime. One month after the crime had been committed, a postal inspector filed a report showing that the defendant had admitted to Government agents that he had possessed and then sold five of the stolen guns and that the Government had developed strong evidence linking him to the remaining guns. Little additional informa-

tion was uncovered during the remaining seventeen months that elapsed before the filing of the indictment (431 U.S. at 784-85).

In support of his motion to dismiss the indictment, the defendant in *Lovasco* alleged that two material witnesses had died during the period of delay. He did not explain how the witnesses would have aided his defense even if they had been willing to testify (431 U.S. at 785-86).

In response to the *Lovasco* motion for dismissal, the Government represented that the delay was caused by the Government's efforts to identify persons in addition to Lovasco who may have participated in the offenses. Both the Court of Appeals and this Court accepted that representation (431. U.S. at 796). Neither the District Court nor the Court of Appeals found the Government's explanation sufficient to withstand a due process attack, and they found that the delay required dismissal.

This Court reversed upon the ground that a delay which arises from the Government's continued pursuit of an investigation does not offend due process (431 U.S. at 794-96). In reaching that conclusion, *Lovasco* left no doubt that a good-faith continued investigation of the defendant or of other related perpetrators precludes due process relief grounded upon the fact of delay, even if the defendant should suffer some prejudice as a result of it.

The concluding paragraph of *Lovasco* provides an appropriate starting point for an analysis of the issues presented by the instant petition:

> "In *Marion* we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions. 404 U.S. at 324. More than five years later, that statement remains true. Indeed, in the intervening years so few defendants

> have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay. We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases. We simply hold that in this case the lower courts erred in dismissing the indictment." (431 U.S. at 796-97)(Footnotes omitted)

With the passage of more than five and a half years since the decision in *Lovasco*, we respectfully submit that the facts of the instant case present an appropriate vehicle for a further clarification of the principles applicable to pre-accusation delay.

* * *

Several Courts of Appeals, including the Second Circuit, have construed *Marion* and *Lovasco* to require an improper tactical motivation for delay on the part of the Government before an indictment will be dismissed for pre-indictment delay: *United States v. Lai Ming Tanu*, 589 F.2d 82, 89-90 (2nd Cir. 1978); *United States v. Brown*, ____ F.2d ____, Slip. Op. No. 80-5194 (6th Cir., January 8, 1982); *United States v. Bruscino*, 662 F.2d 450 (7th Cir. 1981); *United States v. Mills*, 641 F.2d 785 (9th Cir. 1981).

Other opinions have phrased this aspect of the test in terms of whether the Government's reason for the delay was motivated by bad faith or with an intention to harrass the defendant, *United States v. Nixon*, 634 F.2d 306, 310 (5th Cir. 1981); *United States v. McManaman*, 606 F.2d 919 (10th Cir. 1979); or as requiring more than ordinary negligence, *United States v. Glist*, 595 F.2d 1374, 1378 (10th Cir. 1979); or being accompanied by an ulterior motive, *United States v. Francisco*, 575 F.2d 815, 817 (10th Cir. 1978); or as being unreasonable, *United States v. Rogers*, 639 F.2d 438, 440 (8th Cir. 1981).

We believe that the most perceptive analysis is contained in *United States v. King*, 593 F.2d 269 (7th Cir. 1979):

> "Two of the questions left unanswered are (1) given actual prejudice resulting from the delay, what sort of purpose or reason behind the delay must be shown to give rise to a due process violation, and (2) who bears the burden of proof on this issue. Some courts have seemed to require the defendant to prove that issuance of the indictment was purposefully delayed in an attempt by the Government to gain a tactical advantage over the defendant. *See, e.g., United States v. Francisco*, 575 F.2d 815, 817 (10th Cir. 1978) ("It is our view that [*Marion* and *Lovasco*] do not permit us to second-guess the timing of the Government's indictment in the absence of proof by an accused of both actual prejudice to his case and an ulterior motive by the prosecution for such delay"). Others have read *Lovasco* as only requiring the defendant to prove actual prejudice, after which showing it is up to the court to balance the reasons asserted by the Government against the prejudice asserted by the defendant. *See, e.g., United States v. Brand*, 556 F.2d 1312, 1317 n.7 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978). We believe that the latter view is the better one and most closely follows the balancing analysis employed by the Supreme Court in *Lovasco*." (593 F.2d at 272)

See also: United States v. Townley, 665 F.2d 579, 582 (5th Cir. 1982); *Arnold v. McCarthy*, 566 F.2d 1377, 1390-91 (9th Cir. 1978) [dissenting opinion of Ely, J.]; *United States v. Medina-Arellano*, 569 F.2d 349, 352, fn.2 (5th Cir. 1978); *United States v. Radmall*, 591 F.2d 548, 552-4 (10th Cir. 1979) [dissenting opinion of McKay, J.]. Each of the foregoing opinions and dissents reflect an approach which is in accord with this Court's

opinions in *Marion* and *Lovasco* and at odds with the more stringent rule that limits relief to those situations involving deliberate delay by the prosecution in order to secure a tactical advantage.

I.

The Court of Appeals Has Misconstrued This Court's Holding in *United States v. Lovasco.*

With substantial reason, the Court of Appeals concluded that the Petitioner ". . . may well have been prejudiced during the five year delay between his SEC testimony and the indictment. . . ." (Appendix A, *infra*, p. 3a). This case, therefore, does not turn upon the frequently absent demonstration of prejudice, but rather upon the reasons for the delay.

In assessing that issue, the Court of Appeals has construed both *Lovasco* and *Marion* as requiring a demonstration that the Government intentionally delayed in order to gain a tactical advantage (*Id.*). We do not believe that such a narrow construction of the opinions in those cases is justified.

In *Marion*, this Court noted that the Government conceded that tactical motivation would require a dismissal (404 U.S. at 324). By no means did *Marion* limit the scope of due process protection to the terms of the Government's concession. Indeed, the Court expressly left open the development of circumstances, short of tactical motivation, which would warrant dismissal (404 U.S. at 325).

In *Lovasco*, the concept of tactical motivation was again used, not as a limiting factor, but solely for the purpose of contrasting to the legitimate investigative purpose present in that case:

> "* * * In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage

> over the accused,' *United States v. Marion*, 404 U.S. at 324, precisely because investigative delay is not so one-sided.[17]" (431 U.S. at 795)

The point is made even more clear by the footnote to the foregoing comment:

> "17. In *Marion* we noted with approval that the Government conceded that a 'tactical' delay would violate the Due Process Clause. The Government renews that concession here, Brief for United States 32, and expands upon it by stating: 'A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense'. *Id.* at 32-33, n.25. As the Government notes, however, there is no evidence of recklessness here." (431 U.S. at 795)

As already noted, *Lovasco* expressly anticipated the future "opportunity to consider the constitutional significance of various reasons for delay" (431 U.S. at 796-97).

II.

Since the Petitioner Has Been Substantially Prejudiced by Extensive Pre-Indictment Delay, Attributable to Clear Prosecutorial Neglect, Under Circumstances Where Prejudice Was Foreseeable, His Right to Due Process Has Been Violated and a Dismissal Is Required.

This case presents the coalition of three factors: extensive delay, prosecutorial neglect and foreseeability. We contend that a lengthy delay caused by prosecutorial neglect warrants dismissal where, as here, the defendant is thereby prejudiced. The foreseeability of such prejudice, during the period of neglect, makes the conclusion all the more compelling. As we shall show, these three factors have the effect of compounding each other.

A. Neglect

In the present case, the Government has conceded that two and one-half years of the delay had no investigative purpose. The case was analyzed by a Department of Justice attorney, and put on the back burner. No meaningful standard has been articulated by the Government for the factors which caused that judgment to be made or for the circumstances which, during that period of delay were believed to be appropriate for an institution of the accusatorial process. The happenstance, of an Assistant United States Attorney travelling to Washington and looking for a case to try, points up the arbitrary nature of the process.

Even at that point, neither the age of the underlying facts (ten years), nor the already unjustifiable lapse of time since the alleged perjury (three years and eleven months), nor the foreseeability of prejudice, prompted the Government to place a priority upon institution of the accusatorial process. Another full year elapsed before an indictment was secured.

B. Length of Delay

The indictment in this case was barely filed within the five year period of limitations. Another month, and an indictment could not properly be found even in the absence of a showing of prejudice or neglect. We thus have a basic legislatively enacted policy which may be reasonably used as a yardstick to measure the egregiousness of the delay in this case. (*Cf. United States v. Marion, supra*, 404 U.S. at 464-65).

By comparison, the eighteen month delay in *Lovasco*, which was justified for investigative reasons, was substantially shorter.

The nature of the Government's proof in this case was substantially identical to that which the Government would have interposed if the defendant had been prosecuted for a violation of the securities laws. It

turned upon his alleged involvement in a stock manipulation scheme during the period 1970-1972. By the time of the 1977 SEC referral of the perjury allegation to the Department of Justice, the statute of limitations had run as to any prosecution for securities violations. While it is obvious that the Petitioner could not have been prosecuted for perjury prior to the alleged commission of such perjury, we submit that, in view of the circumstances of this case, the five to seven year gap between the underlying proof and the defendant's testimony is relevant to a due process assessment of the Government's subsequent lackadaisical attitude toward the case.

C. Foreseeability

While there is little doubt that human memory tends to dim with the passage of time, the occurrence of alleged perjury some five to seven years after the underlying events placed the Petitioner at a disadvantage in that regard from the very day that the crime is alleged to have occurred.

A reading of the Petitioner's SEC testimony makes clear that, during the course of his testimony, he claimed a serious memory problem due to physical and emotional injuries he experienced in an airplane crash. It was certainly reasonable to conclude that the passage of time would likely compound the lapse of memory and diminish the availability of evidence with which he could either refresh his memory or otherwise make his defense.

Finally, while death or other disability cannot usually be predicted as regards any particular witness, the likelihood of such occurrences with respect to important witnesses grows substantially when the period of time involved extends back for as long a time as was the case here.

In the words of the Government's concession in *Lovasco*, that delay was "incurred in reckless disregard of circumstances, known to the prosecution, suggesting

that there existed an appreciable risk that delay would impair the ability to mount an effective defense" (431 U.S. at 795).

Even absent the Government's actual knowledge of the defendant's memory disability, it borders upon the unseemly for the Government to debate the issue of foreseeability in view of the willful and extensive period of delay which occurred here. *See: United States v. Townley*, 665 F.2d 579, 586 (5th Cir. 1982).

As was stated by Judge Ely in his dissenting opinion in *Arnold v. McCarthy*, 566 F.2d 1377, at 1391 (9th Cir. 1978):

> "When a prosecutor postpones charges and trial for a lengthy period of time because he perceives no public interest in resolving the case, he should be deemed to have assumed the risk that the delay might substantially prejudice the accused. Or, putting it another way, the accused should not be penalized for such tactical and mistaken inaction for which he was in no way at fault."

* * *

In its memorandum order, the Court of Appeals stated that Petitioner "failed to show that the Government intentionally *or recklessly* delayed in order to gain a tactical advantage" (Appendix B, *infra*, p. 4a [Emphasis added]). We respectfully submit that this phrasing of the test does not accord with the concept of recklessness or with the prior decisions of this Court. In essence the Court of Appeals has obliterated the difference between intentional and reckless conduct, by requiring that in both instances it is necessary to demonstrate that the Government had an improper tactical objective.

III.

Since the Delay Was Extensive, the Issue Should Not Have Been Determined in Favor of Mere Neglect, Based Upon Summary Affidavits of Government Employees. The Petitioner Should Have Been Granted the Evidentiary Hearing He Requested, and the Burden Should Have Been Upon the Government to Demonstrate a Lack of Tactical Motivation or Recklessness.

The Petitioner's request for an evidentiary hearing should have been granted, particularly in view of the stringent criteria for dismissal imposed by the Courts below. Instead, the Government was permitted to prevail based solely upon the conclusory and self-serving affidavits of supervisory personnel in the Department of Justice. Those allegations should have been tested by cross-examination, and the Petitioner should have been given the opportunity to call to the stand those Government prosecutors who actually worked with the Petitioner's case.

Even the bare assertions of the supervisory personnel are lacking in any supporting data for the proposition that the prioritization in this case was reasonable, and continued to be reasonable over the course of years involved in this delay (*supra*, pp. 8-11).

The requirement of a hearing at which the Government has the burden of justifying its delay was well stated in *United States v. King*, 593 F.2d 269 (7th Cir. 1979):

> "In order for the Court to weigh the competing interests correctly, it is necessary for it to be fully apprised of the reasons asserted by the Government as necessitating the pre-indictment delay. These reasons can best be put forth by the Government. Accordingly, once the defendant has proven (1) actual prejudice, (2) resulting from the delay, the burden shifts to the Government

to show why the delay was necessary.[3] *See United States v. Stewart*, 426 F.Supp. 58, 60 (E.D. Mich. 1976). The district court should follow this procedure on remand." (593 F.2d at 272)

King further explained this rationale in a footnote:

"3. Inherent in the adoption of a balancing process, is the notion that particular reasons are to be weighed against the particular prejudice suffered on a case-by-case basis. Thus we are in no better position than was the Supreme Court in *Marion* and *Lovasco* to rule in the abstract as to the adequacy of a given justification. *See Lovasco, supra*, 431 U.S. at 796-97." (593 F.2d at 272, fn.3)

IV.

The Prosecutor's Tactical Use of the Fruits of the Delay At Trial Should Have Been Found to Provide the Necessary Ingredient of Misconduct Which Required a Dismissal of the Indictment. In the Alternative, Such Tactics Require the Grant of a New Trial.

As found by the Court of Appeals, the defendant's defective memory was a major aspect of the defense at trial. As the Court further found, because of both his memory loss and the death or disability of the attorneys who represented him at the time of the SEC investigation, Petitioner "may well have been prejudiced during the five year delay" (Appendix A, *infra*, p. 3a).

Supra, at pp. 5-7, have quoted the remarks of the prosecutor both in his main summation and in rebuttal, which sought to capitalize upon the defendant's failure to produce the very evidence which had become unavailable because of the delay.

The physician who treated Petitioner for memory loss died during the year prior to the indictment. The prosecutor argued in summation that the Petitioner had not produced evidence of such treatment. Despite

the death or disability of ten of the persons with whom the defendant worked closely during the period prior to the SEC hearing (see second footnote, *supra*, p. 5), the prosecutor pointedly argued that evidence was "uncontroverted" and that the jury had "heard nothing" from Petitioner's "close associates."

To the extent that the Petitioner attempted to mount a defense, without himself testifying, the prosecutor accused him of trying to "con" the jury. In view of the Petitioner's inability to produce important evidence, that argument was both grossly improper and devastatingly inflammatory.

In short, we submit that the prosecutor's reliance upon the fruits of the Government's negligent delay, constituted a tactical use of that delay which warrants a dismissal of the indictment, regardless of whether such tactical purpose has been shown to have existed at the time of the delay.

Conclusion

For all of the foregoing reasons, the petition for a writ of certiorari should be granted, and upon certiorari, the judgment of conviction should be ordered vacated and the indictment should be ordered dismissed; in the

evidentiary hearing as to the reasons for the pre-indictment delay.

March 18, 1982

Respectfully submitted,

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Appendix

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 81-1374

UNITED STATES OF AMERICA,

Appellee,

v.

STEVEN GARY WEIL, a/k/a
STEVEN GARY WEIDMAN,

Appellant.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 16th day of February, one thousand nine hundred and eighty-two.

Present:

Hon. James L. Oakes,
Hon. Jon O. Newman,
Circuit Judges.
Hon. Charles S. Haight,
District Judge.

ORDER

Steven Gary Weil appeals from a judgment of conviction on five counts of perjury (18 U.S.C. § 1621) entered in the United States District Court for the Southern District of New York after a jury trial before Judge Robert W. Sweet. We affirm.

In mid-1970 Weil joined Micro-Therapeutics Inc. ("Micro") as a consultant. Over the next two years Weil solicited purchasers of Micro stock and acted to manipulate a rise in the price of Micro stock from $7 to $22 per

share. In March 1976 Weil testified before the SEC concerning his role in the manipulation of the price of Micro stock, and in February 1981 he was indicted on five counts of perjury committed during his SEC testimony. Weil's defense at trial was that any inaccurate testimony before the SEC was the result of severe memory loss caused by the passage of time and by severe injuries suffered in a plane crash in 1974. On appeal Weil raises a number of challenges to his conviction.

Weil argues first that there was insufficient evidence of perjury. We find, however, that there was ample evidence of Weil's guilt on each of the five counts of the indictment. With regard to Count I, which specified as perjurious Weil's assertions *inter alia* that he had not solicited purchasers of Micro stock, the jury verdict is supported by the testimony of nine Government witnesses that they had bought Micro stock, totaling 5,600 shares, at Weil's suggestion. This testimony, combined with evidence that three others had purchased an additional 2,000 shares through Weil, also contradicts Weil's testimony before the SEC that at the time he joined Micro no more than two or three thousand unsold shares of Micro stock remained. Weil's denial that he sold Micro stock to Arthur Cohn, which is the basis of Count II, was directly contradicted by Cohn's testimony as well as by the corroborating testimony of Martin Shapiro. The remaining three counts are similarly supported by ample evidence that was properly admitted at trial. In connection with his claim of insufficient evidence, Weil also argues that Counts I and II were in part ambiguous. Having failed to move at trial to cure these alleged defects, however, Weil must now be deemed to have waived his challenges regarding them. *See United States v. Viserto*, 596 F.2d 531, 538 (2d Cir.), *cert. denied*, 444 U.S. 841 (1979); Fed. R. Crim. P. 12(b)(2).

Weil next challenges his indictment, arguing that it was either improperly "duplicitous" (joining two or more distinct and separate offenses in a single count) or "multiplicitous" (charging a single offense in several counts). Having failed to make these arguments below, he is again precluded from raising these claims on appeal. *Id.* Even if his claim were not waived, however, we would find no merit to this argument. The five-count indictment specified the following perjurious assertions by Weil: (I) that he had not solicited purchasers of Micro stock; (II) that he had not recommended Micro to Arthur Cohn; (III) that he did not know Otto Staub; (IV) that he did not have a Swiss bank account; and (V) that he had not made statements regarding his ability to control the price of Micro stock. The five alleged false declarations were independent of each other in substance, and therefore were not improperly "multiplicitous" when charged in separate counts. *See generally United States v. Bonacorsa*, 528 F.2d 1218, 1221-22 (2d Cir.), *cert. denied*, 426 U.S. 935 (1976); *United States v. Reed*, 639 F.2d 896, 904-06 (2d Cir. 1981). The responses grouped together under each count went to a single, albeit broadly stated, issue, so that the individual counts were not "duplicitous." *United States v. Berardi*, 629 F.2d 723, 729 (2d Cir.), *cert. denied*, 449 U.S. 995 (1980).

Weil also argues that he was prejudiced by improper preindictment delay. Preindictment delay violates due process, however, only if there is substantial prejudice to the defendant *and* if the delay arises from the Government's intentional effort to improve its position. *United States v. Lovasco*, 431 U.S. 783, 795-96 (1977); *United States v. Marion*, 404 U.S. 307, 324 (1971). In this case, Weil may well have been prejudiced during the five year delay between his SEC testimony and the indictment as a result of the death in 1980 of Dr. Ivan Popov, who treated Weil from 1978 to 1980 for an alleged

memory disorder, the death or disability of his attorneys at the time of the SEC investigation, and his own memory loss. But as Judge Sweet found in denying Weil's motion to dismiss for preindictment delay, Weil has failed to show that the Government intentionally or recklessly delayed in order to gain a tactical advantage. At most, the affidavits of government officials involved in the investigation of Weil show mere neglect because of the low priority assigned to the case, and that in itself does not amount to the requisite government misconduct. *Cf. United States v. Lai Ming Tanu*, 589 F.2d 82, 89-90 (2d Cir. 1978).

Weil claims that his right of confrontation was violated by the receipt into evidence of the deposition testimony of two unavailable witnesses, Othmar Staub and Arthur Cohn, given in a civil action brought by the SEC against Micro, Weil, and others. As Judge Sweet properly found, however, use of their deposition testimony satisfied both Fed. R. Evid. 804(b)(1) and the requirements of the confrontation clause, *see, e.g., Mancusi v. Stubbs*, 408 U.S. 204 (1972). Both witnesses, foreign nationals, were unavailable at the criminal trial; Weil's counsel had taken advantage of his ample opportunity to cross-examine them at the civil proceeding; and Weil had a motive to develop their testimony at that proceeding similar to that which he would have had at the perjury trial. There were thus sufficient "indicia of reliability" to permit use of the deposition testimony.

Weil's final argument is that two letters (Government Exhibits 409 and 411) that Staub purportedly received from Weil were improperly admitted into evidence because Staub was unable to identify Weil's signature on the letters. However, Staub's testimony provided sufficient evidence, as required by Fed. R. Evid. 901(c), to support a finding that the letters came from

Weil: Staub testified that he believed the letters to have come from Weil and the signature to have been Weil's; the letters concerned the purchase of Micro stock, a subject about which Staub had previously spoken with Weil; and one of the letters amended instructions Weil had previously given Staub. The prosecutor's reference to the letters as having come from Weil was therefore proper as well.

Judgment affirmed.

/s/ _____
James L. Oakes

/s/ _____
Jon O. Newman
Circuit Judges.

/s/ _____
Charles S. Haight
District Judge.

Appendix B
Opinion of United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 81 Cr. 57 (RWS)

UNITED STATES OF AMERICA,

- against -

STEVEN GARY WEIL,

Defendant.

APPEARANCES:

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OPINION

Sweet, D.J.

The government has charged defendant Steven Gary Weil ("Weil") with perjury in violation of 18 U.S.C. § 1621 — i.e., making material false statements in sworn testimony before the Securities and Exchange Commission in New York on March 8 and 9, 1976. Weil has moved

to dismiss the indictment for prejudicial pre-indictment delay, to suppress the alleged perjurious testimony or dismiss the indictment for misconduct by the SEC, and for a bill of particulars and other discovery. A hearing will be held to determine whether an investigator of the SEC entered into an agreement with Weil that the latter would not be prosecuted for perjury if he documented certain allegations involving an airplane accident and consequent loss of memory. The motions are denied in all other respects.

Weil seeks dismissal of the indictment on the ground that the delay of almost five years from March 8 and 9, 1976, when his alleged perjury before the SEC was committed, to February 5, 1981, when the indictment was handed down, was a violation of his due process right. He moves in the alternative for a hearing addressed to the reasons for the delay. *See generally United States v. Lovasco*, 431 U.S. 783 (1977).

The Supreme Court in *Lovasco* relied upon the well-established principle that statutes of limitations, "which provide predictable legislatively enacted limits on prosecutorial delay," afford the primary guarantee against the bringing of overly stale criminal charges,[1] but noted that "the Due Process Clause has a limited role to play in protecting against oppressive [pre-indictment] delay." *Id.* at 789. *Archer v. Commissioner of Correction*, Dkt. No. 80-2365, slip op. at 2414 (2d Cir. April 8, 1981). However, to sustain such a due process attack, the defendant must prove substantial prejudice as well as some bad-faith basis for the delay. *Lovasco, supra*, at 790, 795-97. The Supreme Court has not attempted a comprehensive analysis of the constitutional significance of various reasons for delay, *id.* at 797, but has indicated that a finding of due process

violation is appropriate where a delay is undertaken by the government "solely 'to gain tactical advantage over the accused,' " *id.* at 795, *quoting United States v. Marion*, 404 U.S. 307, 324 (1971), or perhaps where a delay is incurred "in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense." *Id.* at 795, n.17, *see United States v. Dennis*, 625 F.2d 782, 794 (8th Cir. 1980). In this circuit a defendant bears a heavy burden of demonstrating not only the actuality of prejudice, *United States v. Elsbery*, 602 F.2d 1054, 1059 (2d Cir.), *cert. denied*, 444 U.S. 994 (1979); *see also United States v. Muse*, 633 F.2d 1041, 1044 (2d Cir. 1980)(en banc); *accord United States v. Mills*, 641 F.2d 785, 788-89 (9th Cir. 1981), but the unfairness of government conduct — amounting to a violation of "fundamental concepts of fair play and decency" — designed to secure a substantial tactical advantage. *United States v. Rubin*, 609 F.2d 51, 66 (2d Cir. 1979), *aff'd*, 101 S.Ct. 698 (1981); *United States v. Sanchez*, 361 F.2d 824, 825 (2d Cir. 1966); *United States v. Ciraulo*, 486 F.Supp. 1125, 1128 (S.D.N.Y. 1980)(Weinfeld, J.); *see also United States v. Muse, supra*, 633 F.2d at 1053 (Oakes, J. dissenting); *accord United States v. Lieberman*, 608 F.2d 889, 903 (1st Cir. 1979), *cert. denied*, 444 U.S. 1019 (1980).

Weil cannot complain of prejudice from the delay from the underlying securities dealings of his in 1969-70 which gave rise to the SEC investigation and his 1976 testimony, to indictment in 1981. The relevant period subject to due process scrutiny is that between the crime (here the alleged perjury in 1976) and the charge. *United States v. Marion, supra*, 404 U.S. at 322; *see United States v. Reed*, No. 80-1948 (8th Cir. May 7, 1981); *United States v. Nixon*, 634 F.2d 306, 309 (5th Cir. 1981). However, Weil does assert by affidavit that his defense

has been prejudiced during this five year delay by the death or disability of witnesses, as well as his own dimming memory. While these allegations are mostly of the general and conclusory variety which are insufficient to invoke due process concerns, Weil asserts specifically that he is prejudiced by the death in December, 1980 of Dr. Ivan Popov, who treated Weil from 1978-1980 for the alleged memory disorder he has suffered since an airplane accident in 1974. It is asserted that Dr. Popov would have been an "extraordinary expert witness" who would have testified to the seriousness of Weil's loss of memory from before the accident, and, presumably, therefore, to the erroneousness of charging Weil with perjury for statements he made in 1975 before the SEC regarding his activities in 1969-70. Additionally, Weil asserts that efforts to locate Dr. Popov's records have been unavailing. Assuming without deciding that this is a sufficient demonstration of prejudice, Weil's due process claim fails in any event for lack of showing of bad faith on the part of the government with respect to the delay.

The chronology of events leading up to Weil's indictment is established by affidavits submitted by the government. In December, 1975 the SEC commenced the investigation of the activities of certain individuals, including Weil, with respect to Micro-Therapeutics, Inc. Weil testified before the SEC on March 8-9 and December 6 and 13, 1976. In June, 1977 the staff investigation concluded with a recommendation for the institution of a civil injunctive action against Weil and others and for referral to the Department of Justice ("Justice") for prosecution of a possible perjury by Weil. In August, 1977 the SEC filed its civil action against Weil and others involved with Micro-Therapeutics in the United States District Court for the District of Columbia. That action was transferred to this court in February, 1978 and is still pending before Judge Lowe. In August

or September, 1977 the SEC referred the Weil perjury matter to the Criminal Division of Justice. After an initial evaluation of the evidence by a staff attorney it was concluded, according to the affidavit of Edward J. Barnes, former Chief of the Securities and Exchange Unit of the Frauds Section of Justice,

> that the Securities Unit of the Criminal Division would pursue no further action at that time. The matter was not closed but rather was held in abeyance pending receipt of any additional information that might be developed by the Commission as well as the availability of attorney resources.

No further action on this matter was taken by the Securities Unit. At a meeting late in 1979, Jed Rakoff, then Chief of the Fraud Section of the United States Attorney's Office for the Southern District of New York, inquired of Burton W. Wiand, an SEC attorney, whether the SEC had any cases awaiting prosecution with venue in this district. Wiand, who was involved in the Micro-Therapeutics civil injunctive action, informed Rakoff of the Weil perjury referral, then inquired at Justice and found out that the matter was not actively being pursued and that Justice had no objection to its being transferred to the United States Attorneys' Office in this district. Following another meeting between Wiand and Rakoff, the SEC's referral and a newly prepared report detailing the alleged perjury were transferred here in February, 1980. Weil was formally charged by indictment on February 5, 1981.

Regardless of Weil's various charges of misconduct by the SEC in conducting the investigation and taking his testimony, to be addressed below, and by an Assistant United States Attorney in this district in the period

since the indictment was handed down,[2] no charge of bad faith is made with respect to the only significant part of the delay, the approximately two and one-half years during which the SEC referral lay idle at Justice. Indeed, there appears on this record no reason why the representations contained in the affidavits submitted by the government in this regard should not be accepted as accurate. Justice apparently assigned the matter a low priority in terms of making an attorney available to act on the recommendation and was perhaps negligent in this, but such conduct is not the kind of impropriety which gives rise to a due process claim. *See United States v. Lovasco, supra*, at 797 n.19; *Dickey v. Florida*, 398 U.S. 30, 45-56, n.9 (1970)(Brennan, J. concurring); *cf. Parratt v. Taylor*, No. 79-1734, 49 U.S.L.W. 4509, 4514 n.5 (U.S. May 18, 1981)(Powell, J. concurring); *Barker v. Wingo*, 407 U.S. 514, 531 (1972). The record, consisting of the affidavits submitted by both sides and argument on the motion, does not support a finding under the cases cited, *supra*, that any or all of the delay between alleged perjury and indictment was due to an intent to secure a tactical advantage in the prosecution, or even reckless conduct toward such an end. Further, any genuine prejudice was dissipated by the filing of the civil action in 1977. Under the circumstances, there is no need for a further hearing, *United States v. Elsbery, supra*, 602 F.2d at 1059, and the motion to dismiss for pre-indictment delay is denied.

Citing various instances of misconduct on the part of the SEC before and during the taking of his testimony on March 8-9, 1976, Weil moves — presumably pursuant to the Due Process Clause and this court's supervisory powers — for an order suppressing the allegedly perjurious testimony and/or dismissing the indictment.

Appendix B
Opinion of United States District Court

Weil's allegations of a "conspiracy" of SEC employees and former associates of his to "get" him can be summarily dismissed. It appears that the SEC investigation into the Micro-Therapeutics matter originated as a result of a complaint submitted by Dr. Edward Settel, a former associate of Weil's in Micro-Therapeutics, to the SEC New York Regional Office. Inasmuch as Richard Freeman, an attorney in the New York office, had previously acted as counsel to Dr. Settel, to avoid the appearance of impropriety the complaint was referred to the SEC Division of Enforcement in Washington for further action. Jacob I. Levine, who participated in the investigation for the SEC, asserts by affidavit that to his knowledge no member of the SEC staff discussed the investigation or any of the individuals involved with Freeman. The March 8-9, 1976 investigative sessions at which Weil's testimony was taken and out of which perjury is alleged, took place at the SEC offices in New York, and counsel for Weil at argument on the motion stated that at one of these sessions, Freeman encountered Weil briefly and smiled menacingly at him. Beyond this unsubstantiated charge, and the conclusory allegations in the affidavit of Weil, no substantiation appears in the record to form a basis for a finding of impropriety, or for further inquiry into the matter. Indeed, in his December 6, 1976 testimony, Weil made allegations of misconduct concerning Freeman and certain unnamed SEC staff members, which were referred to the FBI for investigation. The record of that investigation has been made available to Weil and to the court. No misconduct or conflict of interest on the part of Freeman or anyone else at the SEC was found. Nothing in this record indicates a different conclusion. For the foregoing reasons, that branch of the motion is denied.

Similarly, Weil's contentions that the indictment should be dismissed because the impression was created in various ways that Levine, one of the SEC investigators who conducted the questioning of Weil, was an attorney when in fact he is not, and because the SEC did not pay Weil the required witness fee as well as travel expenses, are meritless. Title 17 C.F.R. § 203 *et seq.*, governing SEC investigations, does not prohibit non-attorneys from serving as SEC staff investigators or from participating as Levine did in the questioning of Weil. No other authority has been cited by Weil in this respect, nor has the court discovered any. Even if the impression was created that Levine was an attorney, no showing has been made of the prejudice to Weil, who was at all times advised and accompanied by counsel. Whatever the merits of Weil's claim for expenses, dismissal of the indictment is not the remedy, nor is a motion for such the means.

Most significantly, Weil asserts by affidavit submitted *pro se* and adopted by present counsel, that the following misconduct occurred on March 8, 1976 just before the first round of questioning began, and induced him into committing perjury:

> [B]efore Weil testified, the SEC was made fully and completely aware of Weil's airplane accident, of his serious head and facial injuries from which he was still recuperating on the day of his testimony. Weil further advised the SEC of his seriously impaired memory as a result of this accident and by way of explaining his reasons for not wanting to testify. Levine then suggested that all parties go to the cafeteria for a cup of coffee and discuss Weil's accident and his intended assertion of his constitutional privilege.

> While in the Federal cafeteria, Levine representing himself as an attorney and as an officer of the SEC told Weil that he was not a target, that it was a private investigation into Micro, that he (Weil) was not a target and that Weil had an obligation as Chairman of the Board of Micro Therapeutics, to give his best recollection of the events surrounding the proxy contest and the issuance of stock in which the SEC suspected irregularities. *Levine advised Weil that so long as he (Weil) could document his airplane accident, he never had to worry about being accused of perjury.* When Fisher [counsel for Weil at the questioning] had raised the question of immunity, Levine responded by stating since it was not an official deposition, there was no need for immunity in such a proceeding. Based upon Levine's representations as a quote "attorney" and as an officer of the SEC representing the U.S. Government and based upon his further assertion that only criminals and people that have something to hide take the 5th, Weil in reliance upon such representations and assertions, agreed to and did in fact testify ....
>
> What Levine and the SEC did, with malice aforethought, was to convince Weil to, unconscionably, surrender his constitutional right against self-incrimination persuading him to testify in direct contradiction and against the advice of his own attorney William Sherr. [emphasis supplied]

As the government correctly argues, Weil is not s[illegible]ved here by the failure to inform him that he was a target of the investigation — or indeed, by the alleged representation that he was not a target — or by any attempt to dissuade him from asserting his admittedly

known Fifth Amendment right. The Supreme Court has held that a witness before a grand jury who is not informed of his full *Miranda* rights or his Fifth Amendment right has no license to commit perjury.

> [A]s the Court has consistently held, perjury is not a permissible way of objecting to the Government's questions. 'Our legal system provides methods for challenging the Government's right to ask questions — lying is not one of them' (footnote omitted). *Bryson v. United States*, 396 U.S. 64, 72 (1969); *United States v. Mandujano*, 425 U.S. [564,] 577, 585 (Brennan, J., concurring in judgment); *id.*, at 609 (Stewart, J., concurring in judgment).

United States v. Wong, 431 U.S. 174, 180 (1977). Indeed, the *Wong* court noted approvingly the holding in *United States v. Knox*, 396 U.S. 77, at 82-83 (1969), that even the predicament of being forced to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury. *United States v. Wong, supra*, at 178-80. Therefore, by analogy, Weil, who was, on the record just after taking the oath, fully warned of the nature of the investigation, his rights and the possible consequences of perjury, (Record of Examination of Steven Gary Weil, March 8, 1976, at 4-10), and was accompanied at all times by counsel — albeit an allegedly inexperienced substitute for Weil's regular counsel who could not attend and who had advised Weil to take the Fifth — cannot complain on this record that he was induced or compelled to or "entrapped" into perjuring himself. *See United States v. Hubbard*, 474 F.Supp. 90, 95-96 (D.D.C. 1979).

Similarly, any misinformation conveyed as to his target status would not render his perjurious testimony suppressible or mandate dismissal of the indictment. *See United States v. Washington*, 431 U.S. 181, 189

(1977); *United States v. DePalma*, 461 F.Supp. 778, 791-93 (S.D.N.Y. 1978). *Compare United States v. Doss*, 563 F.2d 265 (6th Cir. 1977); *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976), *cert. dismissed*, 436 U.S. 31 (1978).

However, Weil makes an additional allegation of misconduct which is not disposed of in the affidavits submitted or the cases cited by the government. Specifically, while the alleged statements and representations by Levine already discussed would not leave Weil at liberty to commit perjury, the government may be bound by a promise not to prosecute — or in this case, not to recommend prosecution for perjury in return for testimony. *See United States v. Rodman*, 519 F.2d 1058 (1st Cir. 1975); *United States v. Sanderson*, 498 F.Supp. 273 (M.D.Fla. 1980); *United States v. Martin*, 480 F.Supp. 880 (S.D.Tex. 1979); *United States v. Lieber*, 473 F.Supp. 884 (E.D.N.Y. 1979); *Matter of Doe*, 410 F.Supp. 1163 (E.D.Mich. 1976). *But see Doe v. Civiletti*, 635 F.2d 88, 95-97 (2d Cir. 1980); *United States v. Hudson*, 609 F.2d 1326, 1328-29 (9th Cir. 1979); *United States v. Fields*, 592 F.2d 638 (2d Cir. 1978), *cert. denied*, 442 U.S. 917 (1979).

The first requisite for the granting of relief in such circumstances is that a clear promise was made and an agreement reached. In this respect, in addition to the allegation of Weil, contained in his affidavit quoted above, of an off-the-record promise, Weil offers only the testimony on a few pages of the record of his testimony which, it is contended, support the claim of an off-the-record agreement. On pages 167-68 of the transcript of March 9, 1976 there appear questions and answers relating to his airplane accident and memory loss. On page 283 of the transcript of that day appears the following answer by Weil to a question about Micro-Therapeutics:

> I don't want you to accuse me of perjury later on, because my memory, like I said, isn't as good as it used to be, and I don't remember things like I used to, but I honestly believe that this is the only agreement that I ever signed with them. ...

At oral argument the government represented that no such promise was made, but no evidence has been introduced in support of that position, nor has there been any contention that any such promise would be unenforceable. On this record, I conclude in the first instance that the existence of a promise or agreement has not been established, but that further inquiry is required. Therefore, although I reject all of Weil's other allegations of misconduct amounting to a conspiracy against him, *cf. United States v. Lieberman, supra*, on this question alone a hearing will be held on June 17 at 4:30 P.M. At that time the parties will have an opportunity to submit any additional material bearing on this matter, including legal argument.

Weil has moved for a bill of particulars pursuant to Fed.R.Crim.P. 7(f). The purposes of a bill of particulars are to apprise the defendant of the charges against him so that he can adequately prepare his defense, to avoid undue surprise at trial, and to enable the defendant to assert a defense of double jeopardy if subsequent charges are filed against him based on the same activities. *United States v. Mannino*, 480 F.Supp. 1182, 1185-86 (S.D.N.Y. 1979). This device may not be used to obtain discovery of the government's theory of the case or of acts underlying the charge, or to restrict unduly the government's proof at trial. *Id., United States v. Chovanec*, 467 F.Supp. 41, 46 (S.D.N.Y. 1979).

Weil has made no showing that the detailed indictment, which in each of its five separate counts of perjury sets forth, verbatim, the alleged perjurious testimony as well as a statement of why that testimony is alleged

to be perjurious, together with all the discovery which he has had or will have, is inadequate to protect his legitimate interests. The court is aware of no authority for affording a defendant charged with perjury the kind of detailed information sought here regarding the evidentiary basis for the charge that certain testimony set forth verbatim in the indictment is perjurious. *Cf. United States v. Cuesta*, 597 F.2d 903, 920 (5th Cir.), *cert. denied sub nom. Patterson v. United States*, 444 U.S. 964 (1979); *United States v. Rook*, 424 F.2d 403, 405 (7th Cir.), *cert. denied*, 398 U.S. 966 (1970); *United States v. Yetman*, 196 F.Supp. 473 (D. Conn. 1968). Such a request amounts to a "fishing expedition" designed to elicit the government's evidence, and the identity of its witnesses, in advance of trial. *See United States v. Giacalone*, Dkt. No. 80 Cr. 123, slip op. at 7-9 (S.D.N.Y. June 10, 1980); *United States v. Chovanec, supra; United States v. Leonelli*, 428 F.Supp. 880, 882-83 (S.D.N.Y. 1977); *United States v. Boneparth*, 52 F.R.D. 544 (S.D. N.Y. 1971). The motion for a bill of particulars is therefore denied.

Weil has made numerous discovery requests which extend far beyond the scope of Fed.R.Civ.P. 16. The government represents that it has already turned over all material covered under Rule 16, or that any such additional statements, reports or documents in its possession will be turned over forthwith. The previously alluded to FBI report has already been disclosed, as has the SEC referral letter to Justice. Under Rule 16(a)(2), the government is not required to turn over the original SEC staff report or the referral report to the United States Attorney's Office. The government has also agreed to provide all material required by the Jencks Act, 18 U.S.C. § 3500, by *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), and by F.R.Evid. 803 (24).

Weil's request for disclosure of the names, addresses, and business affiliations of all witnesses the government intends to call at trial is, in the absence of a showing of need, denied. *United States v. Cannone*, 528 F.2d 296 (2d Cir. 1976); *United States v. Goldman*, 439 F.Supp. 337, 350-51 (S.D.N.Y. 1977); *United States v. Sherman*, 426 F.Supp. 85, 89 (S.D.N.Y. 1976). Nor is Weil entitled at this time to the minutes or other information relating to the grand jury proceedings at which his alleged offense was considered. *See* F.R.Crim.P. 6(e)(3), 16(a)(2) & (3); 18 U.S.C. 3500(a). Weil apparently complains that a grand jury properly apprised of his alleged memory problems arising out of the airplane accident would not have returned the indictment. However, an indictment valid on its face is not subject to challenge on the basis of the adequacy or competency of the evidence considered by the grand jury, or the prosecutor's failure to call all available witnesses or present exculpatory evidence. *United States v. Calandra*, 414 U.S. 338, 345 (1974); *United States v. Chovanec, supra*, 467 F.Supp. at 43. Weil has alleged no facts amounting to the requisite showing of "particularized need" to warrant lifting the secrecy of the grand jury proceedings. *Dennis v. United States*, 384 U.S. 855, 870 (1966); *United States v. Rivera*, 465 F.Supp. 402, 414 (S.D.N.Y.) *aff'd mem.* 614 F.2d 1292 (2d Cir. 1979); *United States v. Leonelli, supra*, at 883.

For the foregoing reasons, the motions for discovery, inspection and sanctions are denied in all respects with leave to renew should the government fail to fulfill its obligations under the law. The court is confident that such renewed motion will not be necessary.

IT IS SO ORDERED.

DATED: New York, N.Y.
June 15, 1981

/s/ _____
ROBERT W. SWEET
U.S.D.J.

Appendix C
Opinion of United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 81 Cr. 57 (RWS)

UNITED STATES OF AMERICA,

- against -

STEVEN GARY WEIL,

Defendant.

APPEARANCES:

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Appendix C
Opinion of United States District Court

MEMORANDUM OPINION

Sweet, D.J.

Following a jury trial and conviction on five counts of perjury in violation of 18 U.S.C. § 1621, the defendant Steven Gary Weil moves for a judgment of acquittal, pursuant to Fed.R.Crim.P. 29(c), on the grounds of insufficiency of the evidence and inadequacy of the specifications of perjury in the indictment; for arrest of judgment, pursuant to Fed.R.Crim.P. 34, on the ground of inadequacy of the specifications of perjury; for new trial, pursuant to Fed.R.Crim.P. 33, on the ground that errors committed at trial infringed constitutional rights of defendant; and dismissal of the indictment on the ground of pre-indictment delay. Having heard argument on the motions and considered the papers submitted by the parties, I conclude that the motions must be denied in all respects.

Insofar as the motion for judgment of acquittal on the ground of insufficiency of the evidence is concerned, I conclude, on the basis of the governing principles recently restated in *United States v. Artuso*, 618 F.2d 192, 195 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 226 (1980), that there is no cause for me to disturb any part of the decision of the jury upon the five counts of the indictment as amended during trial.

The rest of Weil's challenges, including the attacks on the specifications of perjury, errors committed at trial, and pre-indictment delay, as acknowledged by counsel at argument, present nothing which has not already been fully considered and ruled upon either orally during trial, or by written opinion. The court has been presented with nothing which would cause it to change its rulings on these matters at this time.

Appendix C
Opinion of United States District Court

For the reasons stated, the post-trial motions of the defendant are hereby denied. Sentencing will take place, as scheduled, on September 1, 1981, at 9:30 A.M. in Courtroom 36.

IT IS SO ORDERED.

DATED: New York, N.Y.
August 31, 1981

/s/ _____
ROBERT W. SWEET
U.S.D.J.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,

No. 81-1732

In the Supreme Court of the United States

OCTOBER TERM, 1981

STEVEN GARY WEIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
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QUESTIONS PRESENTED

1. Whether preindictment delay deprived petitioner of due process in violation of the Fifth Amendment.

2. Whether the prosecutor's summation violated due process by unfairly capitalizing on the unavailability of potential witnesses of petitioner's who had died before trial.

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DOJ-1982-05

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1732

STEVEN GARY WEIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not yet reported. The opinion of the district court (Pet. App. 6a-19a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1982. The petition for a writ of certiorari was filed on March 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 1, 1981, following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on five counts of making false statements under oath during a Securities and Exchange Commission investigation, in violation of 18 U.S.C. 1621. He was sentenced to three concurrent one-

year terms of imprisonment on Counts 1-3; his sentence on each of Counts 4 and 5 was suspended in favor of three years' probation. He was also fined $1,000 on each count (C.A. App. A.18).[1]

1. The evidence at trial showed that in 1970 petitioner joined Micro-Therapeutics, Inc. ("Micro") as a consultant. During the ensuing two years, petitioner solicited purchasers of Micro stock and acted to manipulate a tripling of the price of Micro stock (Pet. App. 1a-2a).

In December 1975, the Securities and Exchange Commission began an investigation of the activities of certain individuals, including petitioner.[2] Petitioner testified before the SEC on March 8-9 and December 6 and 13, 1976. The SEC staff concluded its investigation in June 1977. In August 1977, in addition to instituting a civil injunctive action against petitioner, the SEC referred the matter to the Department of Justice with the recommendation that petitioner be prosecuted for perjury (Pet. App. 9a-10a; C.A. App. A.80). Shortly thereafter, the Department of Justice conducted a preliminary analysis of the materials submitted by the SEC. Based on that analysis, the priority of other assignments, and the resources then available, the Department of Justice decided not to pursue further action at that time (Pet. App. 10a; C.A. App. A.83-A.84). The matter was held in abeyance pending receipt of additional information and the availability of attorney resources (*ibid.*).

No further action was taken until late 1979, when the Chief of the Fraud Section of the United States Attorney's Office for the Southern District of New York inquired of

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[1]"C.A. App." refers to the "Appellant's Appendix" in the court of appeals.

[2]The chronology of events leading to petitioner's indictment was established by affidavits submitted by the government (Pet. App. 9a; C.A. App. A.72-A.84).

the SEC's Division of Enforcement about cases with venue in the Southern District of New York. Further inquiry by the SEC determined that the Department of Justice had no objection to the referral of the perjury charges against petitioner to the United States Attorney's Office, and this was done in February 1980 (Pet. App. 10a; C.A. App. A.81-A.82). That office promptly commenced a grand jury investigation in March 1980, which resulted in petitioner's indictment on February 5, 1981 (Pet. App. 10a; C.A. App. A.50).

2. Prior to trial, petitioner moved for dismissal of the indictment, claiming that the time that had elapsed before indictment violated his Fifth Amendment due process rights (C.A. App. A.36). Petitioner asserted particularly that he was prejudiced by the death in December 1980 of Dr. Ivan Popov, who treated petitioner from 1978-1980 for a memory disorder he allegedly suffered after a 1974 airplane accident (Pet. App. 9a; C.A. App. A.26, A.58-A.61).[3] The district court assumed without deciding that petitioner's allegations sufficiently demonstrated prejudice, but held that his claim nonetheless failed because he had not shown bad faith on the part of the government (Pet. App. 9a). The court of appeals affirmed, holding that petitioner failed to show that the government intentionally or recklessly delayed in order to gain a tactical advantage (*id.* at 4a).

ARGUMENT

1. Petitioner contends (Pet. 13-22) that the court of appeals erred in holding that the preindictment delay here did not violate due process. This contention is without merit.

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[3]Petitioner also claimed that he lost the testimony of the two attorneys who represented him during the SEC investigation; one of them had become unavailable due to a heart attack and the other had suffered a mental breakdown (C.A. App. A.26).

a. In *United States* v. *Marion*, 404 U.S. 307, 324 (1971), this Court stated that "the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay * * * caused substantial prejudice to [the accused's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."[4] In *United States* v. *Lovasco*, 431 U.S. 783, 788-796 (1977), the Court reaffirmed these two prerequisites to finding a due process violation. While the Court noted with approval the government's concession that a due process violation could occur through "reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense" (431 U.S. at 795 n.17), the Court made clear that the delay must be the product of fundamentally unfair government conduct.

Thus, this Court has flatly rejected petitioner's contention (Pet. 18) that prejudice caused by a period of "prosecutorial neglect" warrants dismissal of the indictment. Here, we do not concede that the government's decision to allocate its resources by assigning a low priority to this case, resulting in a substantial preindictment delay, could properly be characterized as "neglect." But whether or not it could be so labeled, the delay for these reasons did not violate due process; it was not conduct that "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' * * * and which define 'the community's sense of fair play and decency.' " *United States* v. *Lovasco, supra*, 431 U.S. at 790 (citations omitted). In fact, it is quite appropriate for a prosecutor to

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[4]An alternative statement of the test requires actual prejudice and a showing that the government intentionally delayed to gain a tactical advantage over or to harass the accused. *United States* v. *Marion, supra*, 404 U.S. at 325.

consider personnel shortages or the greater urgency of other cases in making the decision whether or not to seek an indictment at a particular time in a given case. See *United States* v. *Radmall*, 591 F. 2d 548, 550 (10th Cir. 1978); *United States* v. *Tempesta*, 587 F. 2d 931, 934 (8th Cir. 1978), cert. denied, 441 U.S. 910 (1979). The Due Process Clause is not violated simply because a court, with the benefit of hindsight, disagrees with the prosecutor's judgment as to when to seek an indictment. See *United States* v. *Lovasco, supra*, 431 U.S. at 793 & n.14; *United States* v. *Marion, supra*, 404 U.S. at 321-322 n.13.

Petitioner's suggestion (Pet. 20-21) that the government's delay was "reckless" because petitioner had informed the government in his SEC testimony that he had a memory problem is insubstantial. This preexisting memory problem is not the source of petitioner's claim of prejudice. When the Justice Department decided to hold petitioner's case in abeyance, it had no way of knowing that petitioner would later consult a doctor who would die before an indictment was returned. Plainly, the delay here was not taken in disregard of a known "appreciable risk" that it would "impair [petitioner's] ability to mount an effective defense." *United States* v. *Lovasco, supra*, 431 U.S. at 795 n.17. In short, the conclusion of both courts below that there was no government misconduct here that could support a finding of a due process violation is fully in accord with the decisions of this Court in *Marion* and *Lovasco*.[5]

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[5]Petitioner's suggestion (Pet. 16-17) that the decisions of other courts of appeals conflict with the decision below is without merit. In none of the cited decisions did the court find a due process violation. And while the language in some of those decisions differs to some extent from that used by the court below, those other courts do not purport to depart from the *Lovasco* standard that a due process violation occurs only when government misconduct makes it "fundamentally unfair" to bring

b. In addition, petitioner has failed to demonstrate the actual prejudice required for a Fifth Amendment violation. Neither court below reached this issue; because petitioner's claim of government misconduct was plainly insubstantial, the courts simply rejected his due process claim on that ground while assuming arguendo that actual prejudice could be demonstrated (see Pet. App. 3a-4a, 9a). In fact, the record does not support petitioner's claim of actual prejudice.

The district court found (Pet. App. 9a) that the bulk of petitioner's allegations of prejudice (see Pet. 5 n.**) were "of general and conclusory variety" and did not raise any due process concerns. The only allegation that conceivably could support a finding of actual prejudice is the claim that, if petitioner had been indicted sooner, the testimony of Dr. Ivan Popov would have been available to him.[6] According to petitioner's affidavit (C.A. App. A.58-A.61) and his memorandum in support of the motion to dismiss (C.A. App. A.23-A.35), Popov was a doctor whom petitioner consulted in 1978 for memory problems that he claimed to have suffered following a 1974 airplane accident. That the inability of Dr. Popov to testify at trial prejudiced petitioner is purely a matter of speculation. No evidence other than petitioner's own assertion showed that Dr. Popov ever

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the accused to trial, which was clearly not the case here. See *United States* v. *Medina-Arellano*, 569 F. 2d 349, 353 (5th Cir. 1978).

[6]Petitioner repeatedly refers (see Pet. 3, 4, 19, 20) to the ten years that elapsed between his indictment and the manipulation of Micro's stock, implying that he was somehow prejudiced by the passage of that period of time. Petitioner's perjury occurred in 1976, however, and, as the district court correctly observed (Pet. App. 8a), the time period prior to the perjury is completely irrelevant.

treated petitioner for a memory problem.[7] Moreover, petitioner did not consult Popov until 1978—four years after the accident that he claims caused the memory problem.[8] Indeed, since petitioner did not see Popov until two years after he committed perjury, a speedy indictment would have deprived him of Dr. Popov's testimony as surely as a tardy one.

c. Petitioner also contends (Pet. 22-23) that he should have been granted a hearing at which he could have tested "the conclusory and self-serving affidavits of supervisory personnel in the Department of Justice." This contention is insubstantial. The government's affidavits set forth the entire pre-indictment background of this case, including the reasons why the case was referred to each government office and the factors considered when deciding how and when to pursue it. There was no reason to question the veracity of these sworn assertions, and the district court was entitled to rely upon them. See *United States* v. *Elsbery*, 602 F. 2d 1054, 1059 (2d Cir.), cert. denied, 444 U.S. 994 (1979). On the record before it, with no evidence of bad faith or recklessness on the government's part, the district court could legitimately have decided, as it did (Pet. App. 11a), that there was no need for a further hearing.

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[7]Indeed, petitioner's statement to his own expert witness that he consulted Dr. Popov also for "sexual disturbances" (Tr. 1281; cf. Tr. 1512) and Dr. Popov's writings on sex, not memory problems (see Tr. 1326-1327, 1397-1398, GX40), cast doubt on this assertion.

[8]The record casts substantial doubt on whether petitioner ever experienced any memory problems at all. The records of the hospital where petitioner was admitted after his accident, the records of eight doctors petitioner consulted from 1974 to 1978, and the testimony of the hospital doctors who treated him after the accident provide no evidence of any mental impairment, loss of memory, or other psychiatric problem (see Tr. 1309-1325, 1576-1577, 1580-1581, 1594-1599).

2. Petitioner's contention (Pet. 23-24) that the prosecutor's summation violated due process because it capitalized upon the unavailability of petitioner's witnesses is groundless. Assuming that there might be some circumstances in which a summation of this sort would be fundamentally unfair, the record refutes petitioner's claim that the prosecutor here capitalized on the unavailability of petitioner's potential witnesses.

Petitioner challenges as capitalizing on Dr. Popov's absence the prosecutor's statement in summation that petitioner had not produced evidence of treatment for memory loss (see Pet. 6). But the record demonstrates that the prosecutor did not take advantage of Dr. Popov's absence. In the context of the entire trial (see, *e.g.*, *United States* v. *Stassi*, 544 F. 2d 579, 585 (2d Cir. 1976), cert. denied, 430 U.S. 907 (1977)), it is clear that the prosecutor was, for the moment, simply "leaving Dr. Popov aside" (as he had expressly stated in an earlier context, Tr. 1324), and was not attempting to mislead the jury by concealing petitioner's consultations with Dr. Popov. Indeed, it was principally through answers elicited by the government on cross-examination of petitioner's expert witness that the jury learned of Dr. Popov's alleged role (Tr. 1325-1331, 1395-1399) and petitioner's failure to have sought psychiatric help before seeing Dr. Popov (Tr. 1309-1325). Moreover, Dr. Popov's presence or absence had no effect on the force of the government's argument that, for four years after his accident, petitioner consulted several doctors without complaining of memory loss to any of them and without being referred for neurological or psychiatric care. The failure of trial counsel to take objection to the remarks now complained of bespeaks his own recognition that, taken in context, the comments were not improper and did not unfairly prejudice petitioner. See *United States* v. *Canniff*, 521 F. 2d 565, 571-572 (2d Cir. 1975), cert. denied, 423 U.S. 1059 (1976).

Similarly meritless is the complaint that the prosecutor highlighted petitioner's failure to call close business contacts as witnesses to his memory loss (see Pet. 6). Petitioner's argument that some of his business associates had died or were disabled completely overlooks the fact that he has never contended that all his close business associates had become unavailable. Thus, whether or not one or two of petitioner's associates in Micro had died, the prosecutor's statement calling attention to the fact that petitioner had called as witnesses to his memory loss persons whose contact with him in the post-accident period was only marginal, rather than close business associates, was perfectly proper on this record. See, *e.g.*, *United States* v. *Sindona*, 636 F. 2d 792, 806 (2d Cir. 1980), cert. denied, 451 U.S. 912 (1981); *United States* v. *Barnes*, 604 F. 2d 121, 148 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980); *United States* v. *Bubar*, 567 F. 2d 192, 199 (2d Cir.), cert. denied, 434 U.S. 872 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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GLORIA C. PHARES
Attorney

MAY 1982